United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-1428

To be argued by
ELLIOT G. SAGOR

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P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

DAVID KAPLAN,

Defendant-Appellant.

On Appeal From the United States District Court For the Eastern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1428

UNITED STATES OF AMERICA,

Appellee,

vs.

DAVID KAPLAN,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Statement of Issues

1. Was the defendant denied due process in the sentencing procedures when the court refused to hear from the Pretrial Services Officer who supervised and counselled defendant for over six months and who would offer positive information of defendant's development?

2. Did the sentencing court receive the "best available information" about defendant's occupational adjustment, activities,

and rehabilitation, when probation refused to investigate and inquire, despite counsel's requests; and if not, should a sentence resting on material informational flaws be vacated?

3. Is it proper for a sentencing court to believe that when it comes to the drug statutes, regardless of the drug involved, Congress required that punishment must be considered first and that the statute is "punitive"?

4. Do the fairness considerations underlying the Petite policy, which bars successive prosecutions for crimes for which a defendant has already been punished, require that the court give great weight to the fact that defendant was already severely punished in a foreign country for the crime to which he pled guilty?

5. Can a sentence be permitted to stand when the probation officer and the sentencing court considered defendant to have been previously convicted and when the probation officer thought the defendant misled him about the existence of the previous conviction when in fact it is learned subsequent to the sentence that defendant was correct and had not been convicted?

6. Can a defendant be sentenced for alleged crimes extrinsic to the indictment, denied by the defendant, and based on the rankest informant hearsay without first requiring upon the request of the defendant that the government provide some substantiation at a hearing?

Statement of the Case

David Kaplan appeals from a sentence pursuant to a judgment of conviction entered in the United States District Court for the Eastern District of New York on September 23, 1977 after his guilty plea before the Honorable Mark A. Costantino, United States District Judge.

Indictment 76 Cr. 259 filed April 9, 1976, charged in one count, David Kaplan and his wife Shelly Kaplan with conspiracy to violate the narcotics laws involving marijuana and hashish in violation of Title 21, Sections 176a; 841(a)(1), 846, 952(a), 960(a)(1) and 963.

On June 10, 1977, David Kaplan pled guilty to that period of time in the alleged conspiracy occurring after May 1971, when the new narcotics law went into effect. He was sentenced by Judge Costantino on September 23, 1977 to three years imprisonment and a special parole term of five years pursuant to 21 U.S.C., §841 (a)(1) and 960(a)(1) and 18 U.S.C. §4205(b)(2). Mr. Kaplan is now serving that sentence.*

The instant appeal is based on several serious errors in the sentencing process, including the district court's reliarce on misinformation and the failure to meaningfully exercise sentencing discretion. Defendant seeks to have his sentence vacated and the case remanded for resentencing.

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* Mrs. Kaplan pled guilty and was sentenced on April 1, 1977 by the Honorable Henry Bramwell on a second indictment for a substantive count of possession of marijuana on April 15, 1976 in violation of 21 U.S.C. §841(a). She received a three year sentence, plus five years of special parole. Judge Bramwell then dismissed the instant indictment against Mrs. Kaplan.

Statement of Facts

The conspiracy charged in the indictment, alleged to run from August 1969 to March 1974, relates to the importation of marijuana and hashish into the United States and its distribution in violation of 21 U.S.C. §176(a) prior to May 1, 1971, and 21 U.S.C.§§841 and 960 subsequent to May 1, 1971. The alleged conspiracy for the approximate two year period from August 1969 to May 1, 1971 was covered by the old narcotics law (§176(a)) which imposed a five-year mandatory minimum sentence with no parole eligibility and a maximum of twenty years. David Kaplan was born on July 14, 1952. Thus, he had just turned 17 years old at the commencement of the alleged conspiracy for which he was charged, involving marijuana and a mandatory term of incarceration. In May 1971 when the Drug Control Act of 1970 became effective, no longer imposing a mandatory minimum, he was 18 years old. Should the defendant have been found guilty of the indictment as charged, the court would have been deprived of all discretion in sentencing David Kaplan (now 25 years old) to a mandatory minimum of five years incarceration for alleged acts he committed when he was 17 and 18 years old.

On July 6, 1972 David Kaplan was arrested in Mexico by Mexican Federal Police in connection with a seizure of marijuana that same date and remained in jail until December 22, 1972.*

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* Affidavit of Assistant United States Attorney Carol Amon dated March 22, 1977, ("Amon Affidavit", par. 3A), submitted in opposition to defendant's motion to dismiss the indictment. Record on Appeal, Item no. 16. The factual recitation in this part of this brief is based, unless otherwise stated, on the Amon Affidavit and the discovery materials turned over to defendant by the Government pursuant to transmittal letters dated February-March 1977, copies of which discovery were also sent to the district court.

The Mexican authorities were aided by a United States agent(s) of the then Bureau of Narcotics and Dangerous Drugs (BNDD) who participated in the arrest and took a statement from Mr. Kaplan on July 6, 1972. That statement was turned over to defendant by the Government. Pursuant to the seizure in Mexico, his plea of guilty in Mexico, and a long interrogation statement, he was sentenced on December 13, 1972 and released on December 22, 1972. (A49a.)*

For a detailed description of defendant's admitted involvement in the conspiracy involving importation of marijuana the court is referred to defense counsel's letter to the district court, (A13a-27a) dated July 21, 1977.

On January 4, 1974 David Kaplan was shot and almost killed by one Gene Mueller. As defendant later admitted (in the course of pre-sentence proceedings in 1977), Mr. Mueller was a co-conspirator in Mexico and in a few marijuana transactions in 1973 (A19a). According to the indictment of Mr. Kaplan, the term of the conspiracy allegedly ended in March 1974. But January 4, 1974 was we believe the last date. We had advised the district court (based on defense counsel's private investigations, but not confirmed or denied in any way by the Government) that the alleged March date is attributable to the fact that March 1974 was the month when Mueller was indicted by New York State for his attempted murder of David Kaplan. (A21a.)

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* "A" followed by a number and the letter "a" refers to the pages in Appellant's Appendix on Appeal. The Government turned over to defendant a copy of defendant's interrogation with a partial translation, and a copy of the Mexican laboratory report confirming that the seizure was marijuana.

Upon the filing of David Kaplan's indictment on April 9, 1976 a bench warrant was issued for both David and Shelly Kaplan. Mrs. Kaplan was arrested on April 15, 1976. She pled guilty to a subsequent indictment and was initially sentenced to a sentencing study on January 21, 1977, the day David Kaplan was arraigned.*

On January 21, 1977 Judge Bramwell set bail in the amount of $100,000 surety bond recommended by the Government. Defendant was remanded in lieu of being admitted to bail. On February 1, 1977 Judge Bramwell denied defendant's application to reduce bail, noting among other things that "there was a conviction in Mexico during which he did time and it is for the very offense that he is here on today."**

On February 7, 1977 defendant moved pursuant to Rule 9(a), Federal Rules of Appellate Procedure, for reduction of bail.*** On February 9, 1977 a panel of this court (Judges Wilfred Feinberg, Murray I. Gurfein, and Thomas J. Meskill) reduced the bail to $50,000 surety bond. Shortly thereafter defendant was admitted to bail with the direction of Judge Bramwell that he confer on a

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* Mrs. Kaplan's defense counsel told Judge Bramwell in connection with her sentencing that she had provided the Government with information as to her husband's whereabouts in New York. Transcript of January 21, 1977 p. 7.

**Transcript of February 1, 1977, p.9.

***Docket No. 77-1050. In strongly opposing any reduction of bail the Government urged that because the indictment charged that defendant was involved with marijuana conspiracy from August 1969 to May 1, 1971 under 21 U.S.C. 176(a) he was "subject to a mandatory minimum sentence of five years with a possible maximum sentence of twenty years" and the possibility of a conviction on this case posed a "great threat in the defendant's mind." Government Affidavit in Opposition to Defendant's Motion for a Reduction of Bail, par. 8.

weekly basis with the Pre-trial Service Office of the Eastern District of New York.*

By Petition for a Writ of Mandamus or Prohibition dated March 23, 1977 filed in this court, David Kaplan sought to disqualify Judge Bramwell pursuant to 28 U.S.C. §§144 and 455 because of, inter alia, Judge Bramwell's exposure to unknown and prejudicial information about him in Shelly Kaplan's pre-sentence report, and related statements which the Judge made at Mrs. Kaplan's sentencing. On March 28, 1977 Judge Bramwell recused himself after previously denying the motion, and on that same date, a panel consisting of Judges Robert P. Anderson, Thomas J. Meskill and Chief Judge Howard T. Markey (of the United States Court of Customs and Patent Appeals, sitting by designation) denied the petition "as moot". Thereafter, Judge Costantino was assigned to this case.

The then pending motion by defendant for dismissal of the indictment, and other motions, were ruled on by Judge Costantino. Defendant moved for an order dismissing the indictment because prosecution of him on the instant indictment was seemingly contrary to the policy of Petite v. United States, 361 U.S. 529 (1960), and its progeny, defendant having already been prosecuted and served time in Mexico for what was, in essence, the crime charged in the instant indictment. Defendant also sought an order prior to the trial date to permit defense counsel to explore, at the appropriate level within the Department of Justice, whether prosecution of

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* Defendant had regular contact with Pre-trial Service Officer Isaac Campbell from February to September 23, when he was sentenced. The district court's refusal, despite defense counsel's several requests, to speak to Campbell and to read Campbell's report, covering the period prior to Kaplan's sentencing, is one of several grounds for this appeal.

defendant was consonant with Petite and other applicable guidelines for prosecution by the Department.*

In addition, as stated in defendant's motion, we asked that the Court dismiss that part of the indictment relating to an alleged conspiracy prior to May 1, 1971, in the interests of justice because of the fact that David Kaplan was 17 and 18 years old at the time. Moreover we urged that it would be confusing to the jury to have to return special findings with respect to a conspiracy before May 1, 1971 and after.** The Government vigorously opposed defendant's application under Petite to dismiss the indictment or to dismiss the part of the indictment prior to May 1, 1971. Its position as stated in the Amon Affidavit, and as continued throughout these proceedings, is that:

> the defendant cannot seriously contend that a conspiracy which is alleged to have begun in 1969 and continued until early 1974 arose out of an isolated seizure of marijuana in 1972 by the Mexican authorities. The defendant's involvement with the marijuana seized in Mexico was obviously only a part of the more extensive conspiracy with which he is charged.

The Government noted that the defendant "conceded that there was no claim of double jeopardy." Amon Affidavit, pp. 5-6. The Government characterized defendant's argument as "frivolous."

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* See Item 16, Record on Appeal, Affidavit of Elliot G. Sagor dated March 4, 1977, Amon Affidavit, and Affidavit of Elliot G. Sagor, dated April 21, 1977.

**The elements under §21 U.S.C. §176(a) which governed the pre May 1971 events are different than the elements of §§841 and 960 which governed subsequent events.

Judge Costantino on April 26, 1977 orally denied defendant's application.*

Faced with a five-year mandatory sentence under the old narcotics law, he pled guilty on June 10, 1977 (as outlined in the plea minutes) to events after May 1971, which did not involve the five-year mandatory minimum (and possible greater exposure) and yet which involved the Mexican marijuana charges for which he had already served time through the end of 1972. When Mr. Kaplan pled guilty to the captioned indictment it was exactly those parts of the conspiracy involving importation of marijuana from Mexico which were discussed and acknowledged upon his Rule 11 voir dire in court.**(A8-9a)

As detailed in the pre-sentence report, a copy of which we understand will be made available to this Court, and as explained by defense counsel to the Court, David Kaplan admitted to two major ventures in marijuana in Mexico. The first preceded the one for which Mr. Kaplan was imprisoned. It is believed that the earlier venture is referred to in the extensive statement that Mr. Kaplan gave to Mexican authorities which was recorded by them in Spanish. The earlier venture involved attempted importation of marijuana from Mexico, largely aborted

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* In denying defendant's motions, Judge Costantino observed, based upon this writer's notes, that he had no power to dismiss a part of the indictment in the interests of justice, and that there was "no double jeopardy" claim made by the defendant. The transcript of April 26, 1977 has not been transcribed.

**Although the United States conspiracy charge covered a longer period of time, the only major ventures covered by the indictment were two in Mexico in 1972.

by seizure in the United States. Thus, both Mexican adventures were essentially failures. As indicated above, David Kaplan spent approximately 6 months in prison at the end of the second venture.*(A16-19a.)

By letter dated July 21, 1977 defense counsel provided the Court with extensive sentencing materials involving the defendant's rehabilitation, along with many character and factually corroborative letters from people who worked with David Kaplan in the diet/nutrition field, from people who he had met in connection with his involvement with the yoga discipline and from acquaintances and family members. The Court is respectfully referred to the material in the Record on Appeal, Index No. 33.

In or about August 1977 defense counsel and defendant were given access to the probation department's pre-sentence report. (A28a.) The pre-sentence report had pictured defendant as a "mastermind" involved in an extensive drug conspiracy involving more than marijuana and going way beyond the bounds of what was charged in the indictment and way beyond the bounds of what the defendant had admitted to in his plea of guilty. By letter dated August 11, 1977 and by defense counsel's letter dated September 14, 1977, defendant made strong objections to the factual accuracy of the material in the pre-sentence report and requested a hearing. Defendant also requested that the probation officer visit with David Kaplan on his job, and view

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* At the time of sentence, the District Court gave no consideration whatsoever to the fact of Mr. Kaplan's incarceration in Mexico. This is discussed infra, pp. 25-30.

Kaplan's work at the Sivananda Yoga Center where he taught certain classes. (A50-51a) The probation department did not respond to such requests.

On September 23, 1977 David Kaplan was sentenced by Judge Costantino to three years imprisonment. He was 25 at the time of sentence and was eligible for Young Adult Offender treatment pursuant to 18 U.S.C. §4216, should the court have found that that was appropriate. The court made no mention of Young Adult Offender treatment at the time of sentence, although defendant was specifically advised that this was an alternative at the time of the plea. On September 23 defense counsel again asked for a hearing, which was denied.

POINT I

Kaplan's sentence was the product of procedures inconsistent with due process of law. The sentencing judge's reliance on misinformation and misunderstanding regarding defendant's prior record and other facts relevant to sentencing, its refusal to consider the "best available information" of defendant's rehabilitation, and its fixed and mechanical approach in evaluating the rehabilitation of any drug dealer, regardless of the drug involved or the circumstances, require that the sentence be vacated as a denial of due process.

David Kaplan seeks appellate review of the procedures and circumstances under which he was sentenced. In asking for reversal of his sentence defense counsel recognizes the general rule that there is no appellate review of sentences: "A sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."* United States v. Tucker, 404 U.S. 443, 447 (1972); Dorszynski v. United States, 418 U.S. 424, 431 (1974). Although Kaplan's three year sentence is within the permissible five year statutory maximum, defendant seeks review because Judge Costantino did not and could not meaningfully exercise sentencing discretion for several reasons which in combi-

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* Nonetheless defendant believes that the sentence was inordinately long and inappropriate under the circumstances. According to statistics counsel previously submitted to the sentencing court, which are part of the Record on Appeal, compiled by the Office of United States Courts, a majority of the defendants in Eastern and Southern Districts and in District of Columbia receive probation for marijuana charges (A26-27a).

nation deprived him of due process of law. A sentence is invalid if, as here, it resulted from: (1) "misunderstanding" and/or failure "to give serious consideration to any information material to mitigation of punishment" such as "rehabilitation", e.g., United States v. Malcolm, 432 F. 2d 809, 817, 819 (2d Cir. 1970); (2) "a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis" United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); Woolsey v. United States, 478 F.2d 139, 143-45 (8th Cir. 1973); Williams v. New York, 337 U.S. 241, 247-50 (1949); and (3) misinformation of defendant's criminal record, e.g., United States v. Tucker, supra, or even the possibility of such influence, United States v. Battaglia, 478 F.2d 854 (5th Cir. 1972).

DEFENDANT'S REHABILITATION

The sentencing errors in this case were attributable in part to a pre-sentence report whose adequacy, accuracy and fairness were fundamentally questioned by defense counsel in writing prior to the sentence. We said (A40a):

> This report should be a document designed to knowledgeably assist the court in reaching an appropriate sentence based on complete and balanced information. It reads rather as a tract for the unacceptable notion that once a man has established a history of wrong-doing, his expressions of remorse and his efforts at rehabilitation and accomplishments must be prejudged as false and unworthy. Thus, for example, the Probation Report practically disregards anything that David Kaplan has done in turning his life around; all of his accomplishments with his job; all of his explanations about the origins and reasons for his past behavior; the suffering he and his family underwent during his imprisonment in Mexico and as a result of

> his having been shot by Gene Mueller; and literally all of the positive and redemptive facts, strongly supported by character letters and other materials, which have been put before Probation and the court to show that the David Kaplan now awaiting sentence is a man worthy of being given leniency and a chance to continue his now solid, productive behavior.

After defendant was arrested on January 21, 1977 he was detained in the Metropolitan Correction Center for approximately one month until he was released on bail which was reduced by this court. His federal incarceration, as well as other factors, had a salutory affect on him. As the court was advised, "He began to take serious stock of his life and the disasters that had followed him." He began work in the diet-nutrition field for a company called Diet-Expo, which was the producer of a major exhibition at the New York Coliseum during April 1977. The defendant had been a major force in the company for six months preceeding his sentence. The company's credentials and David Kaplan's participation have been thoroughly documented by letters that were sent to the court, made available to the probation department and are part of the Record on Appeal. The defendant's life was also additionally changed most positively through his experience with yoga at the Metropolitan Correction Center. He became regularly involved as a participant and then as an instructor at the Sivananda Yoga Center in New York City. (See A21a-27a). The court, as well as probation, was also given many "character letters" submitted on David Kaplan's behalf reflecting very favorably on the credibility of his self-awareness and self-rehabilitation.

It is not the function of this Appeal in any wise to re-argue the points made before the sentencing court, nor could we hope to do that. Our ground for appeal is not that the probation officer disagreed with the evaluation in our letters submitted regarding sentencing. We emphasize rather the failure of probation to do an investigation sufficiently adequate to enable a fair evaluation to be made.

> We object to the fact that probation spent so little time with David Kaplan and reached the far-reaching condemnatory conclusions that it did in its report. We also specifically object[ed] to the fact that probation did not choose to visit David Kaplan at his job; to speak to his employers and co-workers; to visit him at the yoga center; or to speak to any of the personnel at that center ---though I made a specific written request to probation as to each of these matters. Copy of that letter of August 9, 1977 is attached." (A45a)

The fundamental flaw of the sentencing report and its evaluation of David Kaplan's rehabilitation as being insincere, is its superficiality. As the defendant advised Judge Costantino in his letter dated August 11, 1977, "I can understand that the probation officer in the very short time we spent together (really no more than an hour or so in his office and literally minutes at a house visit) saw and heard only superficially who I am." (A28a) It is uncontroverted that Probation never visited Mr. Kaplan on his job with Diet-Expo or at the Yoga Center, or even made a phone call to anyone at those entities. By letter dated August 9, 1977 we urgently requested Probation to spend "some additional time in examining David Kaplan's current activities and life-style, so that the court may be directly advised by Probation of its observations and conclusions in those respects." No attempt was made to make any further contact with Kaplan, although there was over a month in time to do so (A50-51a).

Most significantly, defense counsel again brought these omissions to the attention of the court on the day of sentence. The court excused the absence of any information concerning probation's visit to his job or other activities by saying that "what it states in the report is they found no viable occupation by the defendant during the years of involvement which he has pleaded guilty to. Did he take issue with that statement?"(A56-57a.) The court's apparent disinterest in the usefulness of any information concerning current employment may well be a function of the superficiality of probation's investigation, not the superficiality of defendant's asserted rehabilitation.

The inadequacy of the pre-sentence report in evaluating David Kaplan as he stood before the court on the day of sentence was compounded by the fact that the court refused to hear from the responsible government official who defense counsel strongly urged had valuable information in mitigation to offer concerning the defendant. Since mid-February 1976 David Kaplan has been supervised by Pre-trial Services Officer Isaac Campbell. In the defendant's sentencing letter, counsel requested that the court consider and read Mr. Campbell's report (A25a). Even more significantly defense counsel begged the court to have Mr. Campbell address the court personally at the sentencing. This was particularly urgent in view of the many hours that Campbell spent with defendant as compared to the pre-sentence investigator. The office of the Eastern District Pre-Trial Services Agency was then in the Brooklyn courthouse and indeed was on the same floor as the sentencing court. Defense counsel said to the court: "I trust

that your Honor has the opportunity to consult with Mr. Campbell to review the materials and I would ask your Honor to do so if you have not. He is available." Judge Costantino said: "I don't think its necessary. You could take exception to that." At the close of his presentation defense counsel again pressed for permission to call Mr. Campbell. Counsel said "I wish your Honor had an opportunity to speak to the pre-trial services people and to have Mr. Campbell give you the benefit of what he observed to balance out the probation report." (A64a; A86a)

The only reference in the pre-sentence report to Mr. Campbell's report is to the effect that David Kaplan abided by all conditions imposed by that agency. Such chary discussion is damning. We believe that the Pre-trial Services report speaks to Mr. Kaplan's sincerity, and accomplishments under Mr. Campbell's guidance. We do not have and were not permitted to see a copy of the report, in accordance with procedures of the Pre-trial Services office. We respectfully request that this court obtain a copy of Mr. Campbell's most recent report(s). Indeed, even more important than the report would be the opportunity to have Mr. Campbell write directly to this court, or to permit us, by this court's direction, to obtain a statement from Mr. Campbell to corroborate our claim that this information is significantly different than the probation officer's information. The sentencing court's refusal to hear from Campbell, and its refusal to require probation to make findings concerning defendant's occupational involvement, whether probation would have ultimately changed its conclusion or not, resulted in serious flaws in the sentencing process.

While it has been observed in Smith v. United States, 223

F.2d 750, 754 (5 Cir. 1955), rev'd on other grounds, 360 U.S. 1 that "The lack of Constitutional and evidentiary safeguards thrown around a convicted offender is striking in contrast to those surrounding him before he is found guilty," appellate courts will review sentences to insure that there has been a "scrupulous and diligent search for truth." Townsend v. Burke, 334 U.S. 736, 741 (1948). The pre-sentence report is the foundation upon which an enlightened sentence can be based. See "Use and Disclosure of Pre-sentence Reports", 47 F.R.D. 225 (1969). This is particularly so in a case where the defendant has pled guilty, and the sentencing court has had no opportunity to review the case or hear from a defendant who chooses to testify. See United States v. Robin, 545 F.2d 775, 780-81 (2d Cir. 1969). Even more significantly, with respect to factors in mitigation, is the fact that a court might well be able to read a probation report "conservatively" (A76a) as Judge Costantino observed, but the sentencing court cannot read matters in mitigation expansively if the pre-sentence report is deficient in adequately evaluating such factors because of an insufficient foundation. As Chief Judge Bazelon said in a related context: "the informational basis upon which the court rests its critical sentencing decisions --- [must] be compiled with painstaking attention to accurate and full disclosure of all relevant considerations," United States v. Dancy, 510 F.2d 779, 790 (D.C. Cir. 1975). "Conscientious judges need time for study and deliberation based on the best available information before imposing sentence and therefore place heavy reliance on the pre-sentence report." United States v. Malcolm, supra, 432 F.2d 809, 817-18;

Williams v. New York, 337 U.S. 241, 249-50 (1949). It may well be that it was Judge Costantino's "blind faith" in the report that caused him to be incredulous of David Kaplan's rehabilitation as put forward by defense counsel. United States v. Malcolm, supra, at 818.

In addition, Rule 32a, Fed. R. Crim. P. requires that "before imposing sentence the court shall afford" the defendant an opportunity "to present any information in mitigation of punishment." Here, defendant did not have that opportunity. The court refused to speak to Mr. Campbell whose office was a few steps from the courtroom. "The court had a duty to listen and to give such information serious consideration." United States v. Malcolm, supra at 817. It cannot be assumed that Probation would not have reacted differently had it spent the minimum sufficient time with David Kaplan, and spoken to people at his employment or at the yoga center. Similarly,we cannot assume that had the court had the benefit of speaking to Mr. Campbell, he would not have been more impressed with Campbell's knowledge of David Kaplan and his observations.*

The Pre-trial Services Agency, created by Title II of the Federal Speedy Trial Act (Title 18, United States Code, §3152-3155) of 1974, has several purposes. Among its functions, Pre-

* This writer understands that the Pre-trial Services Officer such as Mr. Campbell is considered on the same level of expertise for salary purposes as the probation officer. We question the ability of a probation officer, after only a short time spent with the defendant, to conclude (as was done here) that his rehabilitation was "superficial" and self-serving. Pre-sentence Report, Evaluative Summary. Certainly Campbell would have a firmer basis for his conclusions.

trial Services will supervise defendants when ordered by a judicial officer (Pre-trial Services Manual, p. 2), which is exactly what was directed by Judge Bramwell as a condition of David Kaplan's bail. In contrast, the probation officer in this case had no function with respect to supervision and/or counseling David Kaplan; his function was to write a pre-sentence report which made certain recommendations to the court. It must be emphasized that pre-trial services supervision is not merely to see that the defendant goes to court at the requested time. The function is broader than that. According to the Pre-trial Services Manual, p. 19, ¶2.2, its "responsibility" includes "the defendant's personal needs to stabilize and improve himself in the community during the bail period..." This thought is echoed in the pamphlet published by the United States Pr trial Services Agency, United States Courts for the Eastern District of New York (entitled "The Role, the Process, the Options, Potential Benefits, Interdependence Location) which states inter alia: "defendants benefit by receiving services which hopefully help stabilize or change their environment, and consequently reduce their potential of recidivism." The United States Government set up an expensive apparatus which did in fact provide for supervision and counseling of David Kaplan, and ironically when it came time for the Government to get the "best available information" as to his rehabilitation, the court refused the offer. To paraphrase the court again in Malcolm, supra, 432 F.2d at 819:

> We cannot say that if the Judge had acted on the basis of complete and accurate information, verified by [Mr. Campbell or the probation officer himself had he spent more time with David Kaplan or spoken to employers and others], it would have had no mitigating

> impact on the sentence. This is so although the Judge, in his discretion, is not required to lighten the sentence if there are mitigating circumstances, but no man can make valid judgments without knowledge of the facts.

See also United States v. Battaglia, 478 F.2d 854 (5th Cir. 1972).

We emphasize the court's further answer to defendant's request that the probation officer spend more time with defendant, particularly at his job: "I think you've taken care of that with the stream of letters that you submitted to the court." (A61a)* The court's characterization of the "stream" of letters is consonant with its belief that is an example of mere advocacy. A59a, lines 4-7. Certainly the defendant had the right to have complete and accurate information submitted by probation to the court in order to avoid or offset this attitude, which downgrades defendant's rehabilitation accomplishments.

FIXED AND MECHANICAL APPROACH

Not only did defendant's sentence suffer from informational flaws regarding his rehabilitation, but it suffered from, we respectfully submit, "a fixed and mechanical approach" in evaluating the rehabilitation of any drug dealer, regardless of the drug involved, or the circumstances. See United States v. Schwarz, supra; United States v. Ingram, 530 F.2d 602 (4th Cir. 1976); Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. Negron, 548 F.2d 1085, 1087-88 (2d Cir. 1977) (dissent).

Those cases make clear that the court is under a duty to "individualize" sentences as the Supreme Court said in Williams v. New York, supra, 377 U.S. at 248. The individualization of sen-

* See p.16 supra, for an earlier answer.

tences dictates that a defendant's rehabilitation, regardless of the crime he commits, must be taken into consideration. Individualization also dictates that no crime must necessarily require punishment, merely because Congress provides therefore. As Williams states, "The punishment should fit the offender and not merely the crime" and "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." 337 U.S. 247-48.

We respectfully submit that the sentencing court was antagonistic to any consideration that this defendant could have rehabilitated himself, or if rehabilitated, that that rehabilitation should be given any weight.

At the sentencing, after counsel asked several times that the court have defendant examined at his job, the court observed (A59a):

> Can we agree on something, that laws are not passed in order for a person to violate them and that after violating them and being apprehended that the statute itself or the violation itself or the indictment, or whatever it may be, is to be cast aside and say he's now on the path of righteousness and therefore the court need not take any action and just probate him to the Government and see what happens to him. I don't think the statute was ever passed for that purpose. If you violate it and there is continuation of the violation, something should be done about it; society has to be paid too. (emphasis added)

The court's approach resulted in a belittling of the extensive evidence of defendant's rehabilitation and the other mitigating circumstances. The court reduced defendant's claim to an absurdity (A77a):

> What I'm really trying to say to you, I will not accept the statement that he was merely a little, naive

> kid, and knew nothing about life. Unfortunately for him he knew too much about life.

Defense counsel's protestations that he was not claiming that he was "a little, naive kid" were to no avail (A78a).

The court's erroneous belief that the statute requires punishment as a first matter, and is punitive, is reflected in the following colloquy (A85a):

> Mr. Beldock: It is my plea today to give all of us who are backing David as well as David, a chance to prove that what he has been for the last eight months now is what he will be forever. If we put him in jail what function will it serve? It will be purely punitive. He'll suffer and we'll suffer. (emphasis added)
>
> The Court: I suppose that's part of the purpose of the statute."

The court requires punishment as a first matter with respect to the statute, and then allows that other considerations may mitigate punishment. Said the court (A85-86a):

> Statutes are passed with a term of punishment for the reason that otherwise it would have no teeth. It's like biting into a piece of bread. From a punitive sentence the maximum mentioned would be the maximum that all those judges would give to all those who appeared before us. What we do is take the punitive sentence of the Congress. Congress intends for us to do something about a violation of that statute number one, and then take into consideration the background, the probabilities, potential and also the extent and involvement in the crime, and when you take those five very important factors into consideration they say you must exercise what they call good judicial discretion. Whether it's good, whether it's bad, that's what they say and that's what I'll accept and I'm ready to pass sentence unless the Government has something to say. (emphasis added)

That the court a few moments later, ritualistically stated that it was exercising "the discretion under the circumstances" (A87a) does not mean that such discretion was used or is insulated from review. There can be no "discretion" exercised,

in a meaningful sense, if one starts - as the court explicitly did here - with the premise that the statute requires a punitive sentence and that probation*(or young adult offender treatment) do not constitute punishment.

* * * *

The court and probation rejected the credibility of defendant's rehabilitation in the face of a demonstrated unwillingness to examine the evidence of rehabilitation so that it could be fairly evaluated. Combining the errors under consideration so far in this Point, one finds David Kaplan deprived of due process by a most twisted "logic" engaged in by the court and probation:

> It is not necessary to investigate evidence of defendant's rehabilitation, no matter how solid it may turn out to be, because his past wrongs require punishment by imprisonment.
>
> Defendant's claim of rehabilitation is insincere and superficial. His evidence of rehabilitation should not be accepted as a true change. Therefore he cannot avoid punishment by imprisonment.

Such an approach (generally followed regarding other errors discussed below) involves a fundamental failure of due process, requiring remand for resentence.

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* On p. 22 supra the court appears to have referred to "probate" in the quoted passage from A.59a. This may be a typographical error; the reference may be to "probation".

ADDITIONAL ERRORS INVOLVING BOTH MITIGATING AND ALLEGEDLY NEGATIVE FACTORS

In addition to the above, there were several other errors involving misunderstanding of both mitigating and negative factors. The mitigating facts related to: (1) the court's refusal to consider for sentencing purposes the six brutal months that the defendant spent incarcerated in Mexico for the same crimes he admitted to in his plea of guilty; (2) the court's disinclination to treat marijuana differently than any other drug; (3) the court's conclusion that the fact that Kaplan was shot and almost killed by a co-conspirator (the informant in this case) and has permanent medical damage as a result, "doesn't weigh towards anything".*

* There were additional errors as well. The court felt it unnecessary to cure the failure to have some probation authorities interview the parents in Florida, where they lived, although the probation office in New York had represented that this would happen at the time of the short New York interview (see A65-66a). See Williams v. New York, supra, at 249 n.14. This was additionally significant because the pre-sentence report presented the parents in a seemingly deprecating manner; questioned the credibility of their explanations regarding the bad influence on David of his older half brother Joel (without giving them the opportunity to correct any misinformation which may have led to probation's misconceptions); and kept reiterating the charge that the parents were unindicted co-conspirators -- a charge which they vehemently denied (see, e.g., A42a). That the court, at sentence, finally seemed to accept their protestations of innocence of criminal action (see A67a, 69a) does not erase this error, which is really another prime example of the fundamental unfairness of the probation report. Had the report supplied the court initially with adequate information about the parents, the court's understanding and attitude might have been more favorable to the defendant. See also the manner in

The defendant's brutalizing service of time in Mexican jail as a consequence of his importation scheme from Mexico was described in detail in the sentencing letter. (See A18a.) One of the grounds for defendant's plea for young adult offender treatment in this case and probation was the fact that he had served time in Mexico for exactly the same offense that he had admitted to in connection with his plea of guilty. Although the conspiracy that he was charged with was more extensive, nonetheless the graveman of the conspiracy was defendant's Mexican involvement. (He has, albeit, admitted to additional marijuana transactions in 1973, which was after his Mexican experience. (See A19a middle of the page.)*

(continuation of footnote)
which the pre-sentence report irresponsibly attempts to attack the credibility of defendant's younger sister Debra before summarizing her information (A44a).

Also, the court placed heavy emphasis on the fact that the defendant was a "fugitive" after a bench warrant was issued for him, because he had knowledge of the charges, and did not turn himself in. (A77a). It is apparent that the court considered his actions criminal. We do not understand that 18 U.S.C. § 1073 requires that a defendant turn himself in. That section makes it a crime for an individual to cross state lines in flight from state, not federal prosecution.

* These specific transactions, involving the informant Mueller, were candidly revealed by the defendant. They are not reflected in the information from the government which is summarized in the pre-sentence report. Indeed, the only specific 1973 transaction alleged in the report is the claim that defendant and his wife were major suppliers of substantial quantities of pills ("speed") toward the end of 1973. This charge, in any form, was directly denied by defendant (A63a). But the court rejected the request for a hearing, by stating that it accepted the defendant's position on that specific objection. We assert that the court could not so avoid a hearing and that the defendant had a right to confront the informant, attack his credibility and try to expose his motivation, e.g., to show that the charge concerning "speed" was falsely made to cover-up the informant's separate criminal activities. We contend that the prejudicial affect of the charge that during the period of the conspiracy Kaplan was a distributor

As we stated in the sentencing letter (27a):

> Finally, the sentence proposed by counsel is fair and just because David (and his family) have already been punished severely by the Mexican imprisonment for essentially the same actions to which he has pled guilty in this case. It is common knowledge, of which the Court may take judicial notice, that it is not the usual practice of our Government to rearrest and reindict United States citizens who have served time in foreign prisons for conspiracies to import narcotics into this country. Moreover, equitable application of the doctrine of Petite v. United States, 361 U.S. 529 (1960) [barring successive federal prosecution], compels that David Kaplan not be again sent to prison for the same conspiracy for which he served such hard time in Mexico. *

Petite is inapplicable as such, because it involved successive federal prosecution after a state prosecution and defendant's Mexican conviction does not constitute a state prosecution. Yet the equities underlying Petite certainly militate in favor of giving substantial consideration to previous punishment for at least a very large part of the conspiracy charged. At the very least, consideration must be given pro tanto for that prior punishment even under the Government's views that the Mexican involvement was a significant part.

(continuation of footnote)
of "speed" -- one of the most dangerous drugs , with well-known damaging psychiatric and physical affects -- could not be eradicated from the court's consciousness by the court's mere assertion. Cf. United States v. Battaglia, supra.

* See Watts v. United States, 422 U.S. 1032 (1975); Croucher v. United States, 45 Law Week 3462 (1977); Rinaldi v. United States 22 Criminal Law Reporter No. 6 (November 7, 1977).

Yet, when defendant's prior incarceration in Mexico was mentioned the court refused to give it any consideration, and did not believe that it could be credited because of a misunderstanding of law. During the course of sentencing, defendant's mother, Fay Kaplan, addressed the court to emphasize her personal knowledge of mitigating factors, including her son's incarceration for Mexico. She told the court: "I saw the results of the torture." (A70a)The court responded that the Mexican conditions were "not as horrible as in some places where they cut your fingers off." (A71a)(The court also indicated that the fact that her son was shot did not weigh towards anything.) At the end of Mrs. Kaplan's presentation of items in mitigation, the court seemed to be annoyed, and said "I will not get involved and side-tracked any further." (A72a)Later when defense emphasized one of its major points, that the "Mexican imprisonment was punishment enough", the court responded that "if that was not so there would be a charge of double-jeopardy." (A78a). The court's reasoning is that <u>if</u> the defendant's "Mexican imprisonment was punishment enough" for the acts he pled guilty to, then he should and could not be prosecuted again because no man should be put in jeopardy twice for acts for which he was already punished. Indeed, this argument has been forcefully made in various cases before the Supreme Court. The court's reasoning is presumably predicated on the statement in <u>Rinaldi v. United States</u> 22 Criminal Law Reporter 4061, 4063 (November 7, 1977) that citizens should be protected "from any

unfairness that is associated with successive prosecutions based on the same conduct." The Supreme Court also said (22 CRL 4062):

> In this respect, the policy [Petite] represents the Government's response to repeated expressions of concern by Members of this Court. In United States v. Lanza, 260 U.S. 377, 383, for example, Mr. Chief Justice Taft quoted the following passage from Fox v. Ohio, 5 How. 410, 435: 'It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by one would not be subjected a second time to punishment by the other for acts essentially the same...'

The district judge reasoned in effect that what defense counsel was saying could not be true because he thought "double-jeopardy" would prevent such double-prosecution for crimes for which the punishment was already had. However, the law is to the contrary. In Bartkus v. Illinois, 359 U.S. 121 (1959), the Supreme Court held that the federal government had power to prosecute for the same act even after the state prosecuted for such act; a fortiori under Bartkus the United States government even more clearly has the power to prosecute, in no wise barred by the Double Jeopardy Clause, for the same acts for which the Mexican government has punished the defendant.

The power to prosecute anew for crimes which have previously been punished by another sovereign does not mean to say

that the sentencing court cannot or should not give such consideration for previous punishment. As the Supreme Court stated in Rinaldi, at 22 CRL 4063, "the overriding purpose of the Petite policy is to protect the individual from any unfairness associated with needless multiple prosecutions." The Petite policy does not prevent, however, if the government so chooses, a second prosecution. But the fact that there is a second prosecution does not mean that previous punishment no longer can be considered a mitigating factor by the court. The fairness implications of the multiple prosecution power continue. The court's misunderstanding of the double jeopardy rule and confusion over the proper consideration that it could give to defendant's prior incarceration are reasons enough alone to warrant remand of this case for re-sentencing.

Also of importance in itself and as an aggravating circumstance, was the sentencing court's disinclination to treat marijuana differently from any other drug.

The court chose to focus merely on whether someone was a user as opposed to the "developing the business" in sentencing the defendant (A81-82a). We agree that that is a most relevant distinction in terms of sentencing, but disagree with the court that the differences between drugs should not be taken into consideration. Such consideration should be given; it is not enough to say merely that marijuana has a lesser maximum penalty than some of the other illegal drugs.

Defense counsel emphasized this to the court; e.g., "Marijuana is what we're talking about." (A82a) The court's response, consistent with its disinclination to treat marijuana differently from any other illegal drug, was illustrated by the statement (A82a):

> "I don't care marijuana, anything that's illegal, big difference being a user and taking what they called in their day a joint and going out and peddling hundreds of pounds, thousands of pounds."

The court further noted that Kaplan was not a "nickel and dime young man."

The nationwide movement in the law with respect to decriminalizing marijuana both on the federal and state levels should have placed marijuana on a different level with the sentencing court than any other drug.

Another error was committed by the sentencing court regarding a negative factor, viz., defendant's possession of 2.26 grams of cocaine on the day of his arrest. The pre-sentence report states that a "small quantity" of cocaine was found in David Kaplan's shoe following his arrest. In point of fact, according to the government's lab report given to defendant, the "small quantity" of cocaine is listed as a net weight of 2.26 grams, more properly characterized as a "miniscule amount" than a "small quantity." When trying to bring to the court's attention that such an amount was wholly inconsistent with dealing in cocaine, defense counsel's explanation was interrupted by the court's emphatic statement (A62a):

> The statute does not talk about proportions. I don't know where anyone gets that idea. There's nothing called a proportionate violation. A statute is either violated or not violated. The quantity is irrelevant --- unless it's the State of New York Marijuana Law."

Having been cut off by the court, and rather than exacerbating the situation, defense counsel went on to other points. Given what may well have been the court's thinking on the subject - that cocaine possession in 1976 should be dealt with very harshly, even if it is not part of the original indictment - the court's refusal to hear defense counsel's explanation about the relative insignificance of the actual amount of cocaine involved prejudiced the defendant.* The court's lack of receptivity deprived the defendant of the opportunity to undo the court's confusion over a significant negative factor against the defendant.

The pre-sentence report took pains to mention that the

* This matter was not brought to the court's attention in the objection letter of September 14 (A40a).

strength of the cocaine tested was 88.5%, but referred to it as a "small quantity". From this the court may well have inferred erroneously that David Kaplan was dealing in cocaine. Defense counsel was prevented from telling the judge the specifics about the "miniscule" (A62a) amount involved and that it should not lead to such an inference. (We calculate that 2.26 grams constituted less than 0.08 of an ounce which is not only commonly understood to be an amount for individual use, but is such as a matter of law.)*

The court was clearly giving the cocaine serious weight in its consideration (A61-62a). Then, after eliciting counsel's explanation about cocaine, the court cut them off, insisting that it did not care about the amount involved.

The refusal to even listen to defense counsel on this score constitutes another serious error in the sentencing process. See United States v. Rosner, 485 F.2d (1973) cert. denied 417 U.S. 950 (1974); United States v. Stein, 544 F.2d 96 (2d Cir. 1976) (defense counsel must at least be given real opportunity to object; court has correlative duty to listen, citing United States v. Malcolm, supra.)

Another error occured during the course of the sentencing colloquy, when Mrs. Kaplan, in her plea for mercy, reiterated the fact that her son had been shot and severly wounded by Mueller, the co-conspirator (A71a). It is clear that such shooting arose

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* The amount in question does not infer an intent to distribute and falls in the category of personal use. See, e.g., United States v. Owens, 344 F. Supp. 1355 (W.D. Texas, 1972); United States v. Gonzales, 442 F.2d 698,709 (2d Cir. 1970); Turner v. United States, 396 U.S. 398 422-424 (1970); United States v. Mather, 465 F.2d 1035, 1037-8 (5th Cir. 1972), aff'd., 475 F.2d 759.

out of Mueller's involvement with David Kaplan; and most effectively terminated this conspiracy. Counsel's submissions prior to sentence had established, as Mrs. Kaplan indicated to the court, that David Kaplan was almost killed and suffered for a long time afterwards. (A71a; Item 33, Record on Appeal). Yet the court responded to Mrs. Kaplan:

"It doesn't weigh towards anything." (A71a).

This quote remained the court's unbending position even though Mrs. Kaplan continued to ask for "justice" and "mercy", emphasizing the comparison of Mueller only serving a year and half for almost killing David Kaplan.

Of course we do not cite Mueller's acts as any excuse for David Kaplan. We do say that the shooting, the hospitalization, operations and course of treatment involved a deeply traumatic experience; that Kaplan was left with permanent medical damage; that this came about as a result of the conspiracy to which he pled; and that both "justice" and "mercy" required that it should be given weight and should have negated or diminished punishment.

It is instructive of the court's erroneous approach to contrast the punishment David received from the Mueller shooting with the type of corporal punishment the court thought might have been useful for the parents to administer had they known about defendant's anticipated involvement in Mexico. Said the court, "both legs would have been broken. That might have been good for him." (A66a).

We see defendant's shooting as a mitigating circumstance entitled to at least some weight in the discretion of any court,

particularly where, as here, the co-conspirator was never similarly prosecuted by the federal government for his involvement in the conspiracy at bar; and only served half the time that defendant Kaplan received, although the former's crime was an unprovoked attempted murder of an unarmed man and defendant's involvement was marijuana. (See A83-84a; A27a)

MISINFORMATION ABOUT DEFENDANT'S PRIOR RECORD

In the sentencing letter, defense counsel advised the court that defendant had not been previously convicted in the United States. (A25a). The pre-sentence report dated July 25, 1977 said that David Kaplan was previously convicted. In the "prior record" section of the report, page 11, it listed an arrest of 12/16/70 at age eighteen involving possession of a forged instrument in the second degree and cited a conditional discharge on 2/9/71 as a "conviction". The pre-sentence report stated that:

> Official court records, exclusive of the above disposition, are not available. This arrest would have escaped our attention had it not been for a local police check since defendant failed to mention it. When confronted with this conviction, the defendant admitted having been in possession of a forged driver's license and in addition to the above disposition, his license was suspended. (Emphasis added).

The pre-sentence report also notes that he was previously "convicted" in the "personal history" section of the report. At the end of the pre-sentence report in the "evaluative summary", the probation officer said:

> His only known conviction in this country occurred in 1971 at age eighteen when he was sentenced to a conditional discharge in local court on forgery charges.

In the objection letter of September 14, 1977, defense counsel painstakingly attempted to rectify this important error. Not only was it important to show that defendant was not previously convicted, but it was important to substantiate the credibility of defendant (and indeed of defense counsel; see A25a) that there was no prior conviction. If the probation officer believed, as he did, that a defendant had "covered up" his "conviction" that could have

worse consequences to the defendant than commission of a crime itself. Any conscientious defense counsel zealously instructs a defendant prior to his interview with the probation officer about the necessity of being absolutely candid.

As indicated above, the probation report stated that "official court records" were "not available" except for the "conditional discharge" disposition. But subsequent to the sentencing (under circumstances to be detailed in a separate affidavit to be filed with the court), we obtained a certified copy of defendant's 2/9/71 disposition as a "youthful offender" - thus not a criminal conviction. We had asked unavailingly for the court's and probation's help prior to the sentencing to obtain such corroborating information.

We had said in the "objection" letter (A42-43a):

> Counsel specifically objects to the claim that Mr. Kaplan was convicted of a crime in connection with an original charge of possession of a forged instrument second degree in Queens [should have read Manhattan] Criminal Court on December 16, 1970. The Probation report indicates that this case resulted in a "conditional discharge" on February 9, 1971. Mr. Kaplan not only did not recollect this matter when talking to the Probation department, but, in subsequent discussions with counsel, had the recollection that the case did not involve a criminal conviction. His present recollection is that he was told by his lawyer then that there would be no permanent record in connection with that matter; and that his "record" would be given back to him. In this respect, the Probation Department may have better information than I have been able to obtain. However, I spoke to Stanley Siegel of the law firm of Herman Graber and Stanley Siegel who represented Mr. Kaplan in the matter. I asked Mr. Siegel to attempt to locate the file to find out what had happened. He did so. He told me that his office only maintains files for felonies and misdemeanors. His office has files for the period of time in question. It does not have a file on David Kaplan. He therefore assumed that the case had resulted in a violation, for which his office would not continue to maintain a file. Under Penal Law §65.05 (New York State) a conditional discharge is an appropriate sentence for a

> violation. I have no further information concerning this matter, but I question its categorization by the Probation Department as a previous conviction of a crime and ask the Probation Department to advise the Court of all the information it has or can obtain in this regard. (It is also possible, obviously, that the case ended with youthful offender treatment. The latter would fit what Mr. Kaplan remembers being told concerning no record of conviction.) I stress this matter because Probation takes pains to utilize it as a prior criminal conviction (although its description of how it obtained the information, by police telephone check, is at least questionable as to its reliability). In addition, I find it difficult to believe, as an experienced criminal counsel, that a matter of such nature, involving an 18-year old who had no previous criminal record, would be resolved so negatively to the defendant, especially since his present recollection is that there was to be no record.

The sentence was adjourned on the court's motion from September 16th to September 23rd. Yet the error persisted. At sentencing, while defense counsel was reviewing with the court those factors that the court might take into consideration concerning Young Adult Offender treatment, the following exchange took place (A75a):

> "Now as he stands before this court I believe he is a <u>first offender</u> under American law, and we take issue with the part of the probation report which I think was inaccurate about some seventeen-year-old matter. (emphasis added)
>
> The court: Wasn't that a forgery of a document?
>
> Mr. Beldock: To my knowledge that was not a matter that ended up with a criminal record, even misdemeanor.
>
> The court: We are not talking about criminal records. We are talking about the man's attitude and his involvement, whether it be criminal or not; sociologically, economically, and criminal, all three.
>
> Mr. Beldock: My point simply was that the probation report said it was a conviction and...
>
> The court: <u>Discharge is a conviction</u>. (Emphasis added).

Mr. Beldock: Conditional discharge can take place for a violation.

The court: No question about it.

Mr. Beldock: It's not a criminal record.

The court: Well, this was not the same as a speeding ticket you know. It was a little different than a speeding ticket. Mr. Beldock, I know you know practically everything to be known about the State law. I think you know now I know quite a bit about the Federal law. I also know quite a bit about sentencing, and I also know how to read a probation report conservatively."

Subsequent to the sentence (under circumstances to be detailed in the separate affidavit) defendant moved ex parte in New York State Supreme Court to have certain sealed records, concerning the Kaplan disposition on February 9, 1971 (held by the Criminal Court of the City of New York) unsealed and turned over to defense counsel. (We did not have a copy of those records and did not know the content). On October 25, 1977 we obtained the certified disposition as a youthful offender, and put a photocopy in our Appendix at A92a.*

Under New York law, both at that time and currently, a YOA was/is not deemed a crime or conviction and cannot be used as such for any purpose, including sentencing on a subsequent conviction.** It is well established law in New York that a court may

* At the time of oral argument we will hand up to the court the certified disposition itself.

** McKinney's, Code of Criminal Procedure §913-n provides:
"Effect of adjudication. No determination made under the provisions of this title shall operate as a disqualification of any youth subsequently to hold public office, public employment, or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction." (Emphasis added.)

not even consider a Youthful Offender Adjudication as a predicate for multiple offender treatment. People v. Carpenteur, 21 N.Y. 2d 571, 289 N.Y.S. 2d 615 (1968). See People v. Colabella, 31 A.D. 2d 827, 298 N.Y.S. 2d 40 (2nd Dept. 1969).

In failing to properly investigate the determination and report it to the court, particularly after defense counsel made a specific request, the probation department carelessly misled itself and the court into believing that it not only had before it a prior offender, but one who was trying to avoid disclosure of his record.

Judge Costantino said he believed defendant's involvement resulted in a "conviction". This error had great negative impact on the credibility of defendant and defense counsel's overall position. If Kaplan were not previously convicted as we contended, it is very understandable how he could not remember the event, because he had been advised that there would be no record made of it. (A42a). If the probation officer accordingly did not believe that Kaplan had covered up, he might have felt altogether different about the defendant and reflect that throughout his report. Additionally the error could have adversely influenced Judge Costantino's not sentencing defendant as a young adult offender.

Where, as here, the sentence is imposed upon misinformation about a previous conviction which was materially untrue, that sentence cannot stand. That sentence must and should be reconsidered. As the court in United States v. Tucker, supra at 449 n. 8., said

it would be "callous to assume" that the sentencing court would "undoubtedly impose the same sentence" had he known that defendant's position was correct; United States v. Battaglia, 478 F.2d 854 (5 Cir. 1972); Franchi v. United States, 464 F.2d 1035 (5th Cir. 1972).

POINT II

The sentencing court did not provide for a hearing or otherwise require at least some type of substantiation of uncorroborated informant information that defendant was the "mastermind" of an extensive drug conspiracy involving more than marijuana as charged in the indictment. A sentence cannot be predicated on information of so little value as here involved.

The pre-sentence report stated that defendant and his wife were involved in a conspiracy to distribute a variety of illegal drugs in large quantities. It listed these drugs as including, in addition to marijuana and hashish, both cocaine and hallucinogenics. It went on to state (p.9) that "federal authorities viewed the defendant as being the moving force or mastermind behind this long standing, large-scale, sophisticated drug conspiracy involving primarily marijuana and hashish..." The report also states that the defendant admitted his guilt in the "instant conspiracy" with respect to events following May 1, 1971.

It was defendant's position before and at sentencing that the report is grossly exaggerated and misleading. For example, the defendant's admissions only related to his involvement in Mexico and to several additional marijuana transactions in the latter part of 1973. He made no admissions that he was involved in a more extensive conspiracy.

In the objection letter defense counsel requested a hearing so that the accuracy and adequacy of the probation report,

on this and other disputed issues, could be determined (A46a).

The letter stated (A41a):

> We object to the Probation Report because of its consistent reliance on hearsay allegations concerning incidents other than the matter for which Mr. Kaplan pled guilty --- the marijuana importation and distribution conspiracy which was terminated in early 1974.

Defense counsel also said (A43a):

> It would seem that the speculative and hearsay information comes primarily from informants, especially from persons whose interest is to cast principal blame on others in order to avoid their own punishment in matters for which they themselves have been apprehended. This type of information is notoriously unreliable and notoriously exaggerated.

At the sentencing defense counsel again asked for a hearing in connection with the objections to the probation report. (A54a). The court only responded specifically to defendant's denial of the claim that he and his wife in late 1973 were "major distributors of pills" (A63a), which the court then "accepted" (A64a).*But defense counsel then informed the court that this untrue charge was only "typical of the kind of pile-on information that came from informants to Kaplan's doorstep." (A64a) (emphasis added).

The court persisted in rejecting the need for a hearing to the very end. Yet, Judge Costantino revealingly commented at the end, despite defendant's earlier request for a hearing, that he was taking into consideration matters extrinsic to Mr.

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* As argued above (footnote at p.27), this method of avoiding a hearing should not be permitted. In itself, without more, it requires remand and reconsideration after a hearing.

Kaplan's plea.* Said the court:

> I'm not sentencing because of the other things but you can't close your eyes. Justice is not blind. There are statements in the probation report that he was involved in some continuing activity but we do not place emphasis on extrinsic alleged crimes. I'm only accepting it as far as background is concerned and not sentencing him on the basis of those activities." (A74-75a).

It seems obvious that Judge Costantino did punish defendant for crimes not charged, not only because he said he was accepting "it as background", but because the defendant received an inordinately long sentence in contrast with the modest period of time left "open" after the time for which he had already been punished by Mexican imprisonment. The long sentence must have reflected the court's belief that the defendant had, in the government's words, "masterminded" other serious crimes as well. Yet, in the objection letter defense counsel advised the court, with explanations, that

> "The only period of time that should be considered for sentencing purposes in this case is the short period between August 1973 and early January 1974 when Mr. Kaplan was shot and almost killed by Gene Mueller." (A42a)

Defense counsel had attached a government report, as of August 14, 1973 (received after plea, under the Freedom of Information Act) showing that the defendant's case was <u>closed</u> on the basis of and after his Mexican conviction and sentence. (A42a) Moreover, in the period between August 1973 and January 1974 the probation report shows one government allegation of a specific crime, <u>viz</u>, that the Kaplan's were believed to have been major suppliers

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* This was apparently so even though defense counsel had no opportunity to effectively refute the unfounded rank hearsay claims by informers; and despite the fact that the government made no charges of this sort (cocaine, speed) in its indictment and provided no discovery thereon.

of speed and to have obtained the drug from a pharmaceutical firm during a trip to Canada (A42a). (This was the allegation, see p.43 supra, on which the court avoided a hearing by "accepting" defendant's denial.) Finally, as a matter of comparative sentencing and by any reasonable standards of penology, it is completely illogical, that defendant's sentence was exactly tailored to his wife's earlier sentence, despite the many negative factors in her picture and, comparatively, very many favorable factors in the defendant's sentence profile (see footnote, A25a-26a).

We urge that if the court were going to rely on negative information even by way of "background", and increase defendant's incarceration by a substantial amount or any appreciable amount, there must be some regard for its accuracy. Presumably if the alleged masterminded conspiracy was so sophisticated and extensive (as the federal authorities told probation) there would be more evidence referred to in the pre-sentence report of defendant's involvements and successes and the defendant would have been charged years ago with other crimes relating to the post-January 1974 period.

Taking even the government's allegations, as stated in the probation report, at the very worst, what we see is a very young man (seventeen and eighteen years old) who was initially (1968-1969) "recruited as the distributor" for and "under the influence of an individual known to the DEA" (emphasis added); whose first implemented attempts to import marijuana came in 1972 after discussions in 1971 with "an informant ...the informant being knowledgeable of the drugs' availability in Mexico and having access to funding" (emphasis added); and who at nineteen, was then such a big-time operator that he ran two substantial

Mexican importations in 1972 (netting, at most, 68 pounds of marijuana -- 40% of the first 172 pounds, the balance having been seized) which ended with six months in jail for Kaplan, and jail sentences for several others. (A18a). In this context, we trust that the appellate court can appreciate the need for a hearing to challenge the grandiose concept engendered by the government's "mastermind" allegations.

Defendant's request for a hearing constituted a double-edged sword. If the government were able to convince the court (and not necessarily through formal means) that these other charges were "true", the court may well have given the defendant more punishment than he would have had the charges remained vague and general allegations. Yet defendant's counsel carefully delineated the grounds for a hearing in the objection letter and reasserted the demand at sentence.* It is notable that at the end of the sentence, when defendant indicated that he wanted to appeal, the government felt constrained to add (A91a):

> I might add just for the record it was specifically addressed to counsel whether they had any problems with any factual statements in the record and your Honor said he didn't consider it.

Defense counsel protested that:

> I don't want the record to indicate that we have done anything to agree with Ms. Amon's comments. We relied on the request that we made in our September 14th letter and the comments made today.

The court's sentence here considered allegations of crime extrinsic to the charges in the indictment predicated on alleged informants who themselves have not been charged by the

* See Resolution dated October 12, 1976 of the Eastern District for appropriate procedures regarding "contested factual issues". (A96a).

government for the conspiracy in which they allegedly participated with defendant. Under the circumstances defendant's timely requests for a hearing should have been honored by the court or at the very least some substantiation of undetailed charges by "faceless" and unknown informants must be required. United States v. Weston, 448 F.2d 626, 631 (9th Cir. 1971). See United States v. Needles, 472 F.2d 652 (2d Cir. 1973); United States v. Robin, 545 F.2d 775 (2d Cir. 1976). In the absence of something more, "a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." United States v. Weston, supra at 634.

CONCLUSION

THE ERRORS IN THE SENTENCING PROCEDURES EITHER ALONE, BUT ESPECIALLY IN COMBINATION, REQUIRE THAT THE SENTENCE BE VACATED AND THAT RESENTENCING OCCUR BEFORE A DIFFERENT DISTRICT JUDGE.*

Respectfully submitted,

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*United States v. Robin, supra at 782 n.31; United States v. Schwarz, supra; United States v. Ingram, 530 F.2d 602 (4th Cir. 1976).

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

DAVID KAPLAN,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Reuben A. Shearer, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030.

That on the 30th *day of* Nov. *19* 77 *at* 225 Cadman Plaza
Brooklyn, N.Y.

deponent served the annexed *upon*

Brief

U.S. Attorney-Eastern District
David Trager

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 30
day of Nov. *19* 77

Reuben A. Shearer

Reuben A. Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979